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The Aarhus Paradox: Time to Speak About Equal Opportunities in Environmental Governance

By Lorenzo Squintani

Last year the twenty years from the starting of the works for the Aarhus Convention were accompanied with quite some attention from the academic community to the manner in which the Aarhus rights of access to information, public participation and effective judicial protection are implemented in the EU and its member states. Judicial protection and Article X of the Rio Convention were indeed the core topics of the IUCN AEL Colloquium, the EELF Conference, and the EELF Workshop with the European Commission about which we wrote in the previous JEEPL number.

Seminal judgments from the European Union (EU) courts confirm that the Aarhus Convention is not a paper tiger (Van Wolferen 2013). What, due to the absence of both the United States of America and Canada at the negotiation table, could have been considered a treaty confirming the status quo existing in the EU does have an impact on the legal orders of the EU and its member states (Jendroska, Aarhus Convention and Community Law: the Interplay, *JEEPL* 2005). The *Trianel*, *Altrip*, *Commission v Germany* trilogy, discussed by Eliantonio & Grashof in the previous JEEPL issue, is exemplary of the profound impact that the Aarhus Convention is having on the daily life of those living and operating in the EU and beyond.

Not only judicial protection, but also access to information and public participation procedures at EU and national level have been amended to meet the Aarhus commitments. An overview of the compliance reports of the Aarhus Convention Compliance Committee shows that compliance is still not full, but improvements are visible.

The increased experience with the normative value and force of the Aarhus Convention is paired by an increase in the attention on its effectiveness in practice. Recently, I read two studies focusing on public participation in the Netherlands from 2013 and 2016 showing a clear difference in the manner in which various groups of society are able to make use of their Aarhus rights. Van der Heijden & Ten Heuvelhof looked in 2013 at how public participation had been organized and performed by the Netherlands during the preparation of the first generation river basins plans implementing the Water Framework Directive occurred in 2008/2009 (Coping with Mandated Public Participation: The Case of Implementing the EU Water Framework Directive in the Netherlands, *Perspectives on European Politics and Society*, (2013) 14:4). Their study shows that, despite the positive assessment given by the EU Commission to the Dutch implementation, the general public considered the public participation procedure as utterly ineffective, as the discussion was dominated by the inputs of agriculture and industry, which had a more direct access to the Ministry than the general public.

In 2016, a report of the National Institute for Social Research highlighted that public participation procedures are effective basically only for high-educated groups of society (Van den Broek e.a., *Niet buiten de burger rekenen!*, Den Haag: SCP 2016). Low-educated groups of society have little chance of success. Previous, more general studies not focusing on environmental protection in particular, showed that low-educated do not take part to meetings organized by the executive power at national and local level (Bovens & Wille, *Acta Polit* (2010) 45).

A quick look at the language used in official documents and reports from national and EU authorities and agencies, which form a stepping stone for public participation as they provide information on the status of the environment, show that these documents are mostly addressed to high-educated groups of society. Even the latest Signal 2016 report of the European Environmental Agency, which is meant for a broad public, shows the use of a language and terminology which is clearly not addressed to low-educated groups of society. Those of us who filled-in the EU Commission's questionnaires used in the context of the refit process of environmental acts have surely felt at times overwhelmed by the level of expertise necessary to provide an answer to certain questions. If high-educated, experts in environmental law feel overwhelmed, what does this say over the accessibility of these procedures for the low-educated members of the general public?

When compared to the manner in which low-educated are involved in general elections, their level of involvement in public participation procedures is significantly lower (Bovens & Wille (2010)). This brings me to question whether decisions following a public participation procedure are as democratic as those reached without such procedures, hence fully relying on representative democracy. Transparency of governmental action is surely enhanced by public participation procedures, but the very foundation of democracy, ie that the government (*kratos*) is of the common people (*demos*), does not seem to be enhanced at all.

If the trends shown in the empirical studies mentioned above were to be confirmed, we would be confronted with a Aarhus Paradox under which the more participation takes place, the less democratic the decision-making process becomes.

I do not argue that public participation should be eliminated and hence that the EU and its member states should go back to a pre-Aarhus situation. On the contrary, the discussion following a confirmation of the existence of the paradox hinted at in this brief note should be on how to make sure that low-educated can take part to public participation procedures as effectively as high-educated so as to further enhance the positive impact that public participation has on environmental decision-making.

Rejecting the possibility that such a paradox exists or, even worst, that the lack of effective participation of low-educated is not an issue of concern are not an option. It would only increase the chance that environmental protection is seen as an elite-driven phenomenon, with all the

negative effects related to such impression (for example those mentioned in Bovens & Wille (2010)).

It is time to speak about equal opportunities in environmental governance openly.